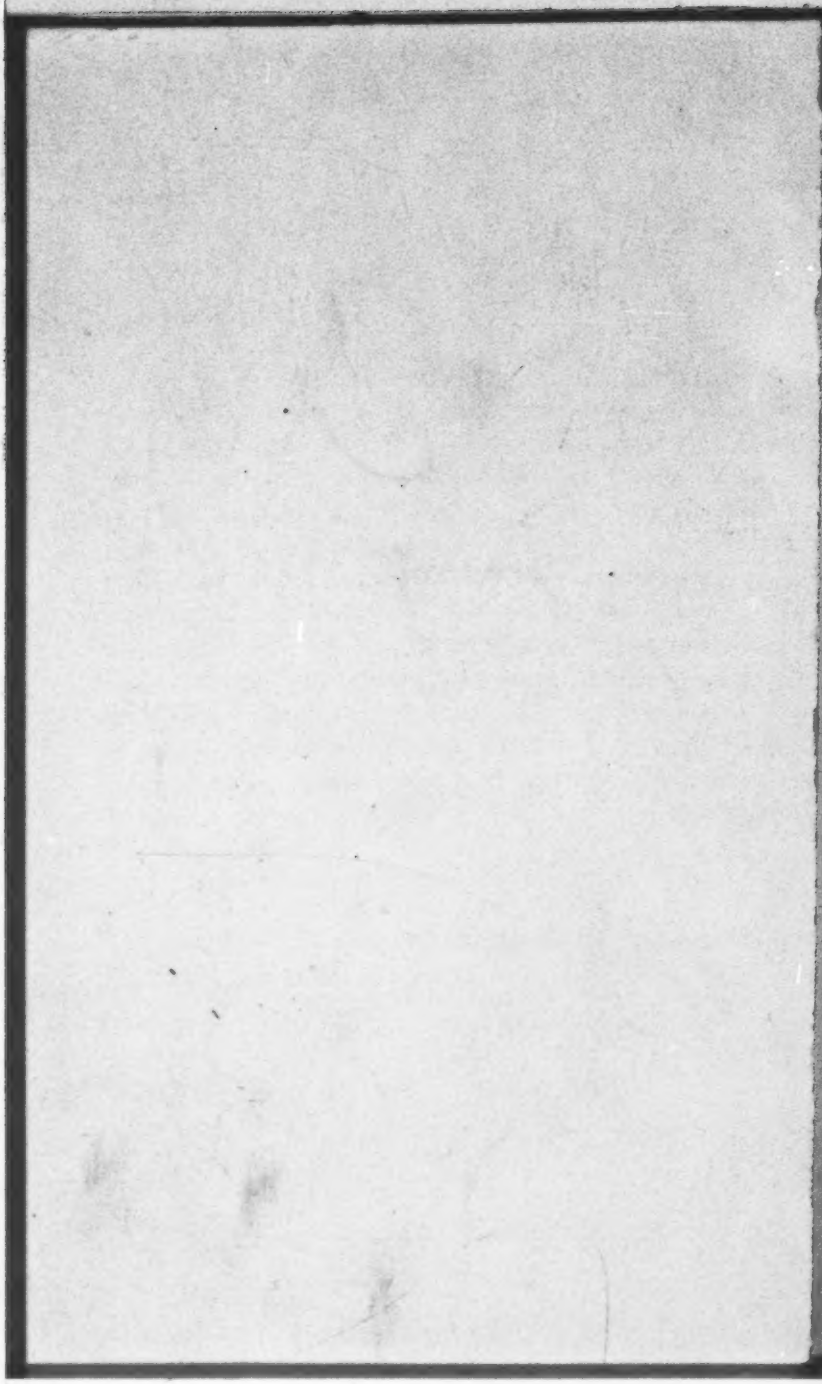

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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, A. D. 1928.

No. 306.

CARSON PETROLEUM COMPANY,
Appellant,

v.

LEON C. VIAL, Sheriff and Tax Collector of the Parish of St. Charles, R. A. DeBroca, Assessor for the Parish of St. Charles, et al.,
Appellees.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

Opinion Below.

The opinion of the Supreme Court of Louisiana reversing the trial Court is reported in *117 So. 432* and is printed in full at pp. 22 *et seq.* of the transcript of record.

Statement of Case.

The appellant filed its petition in the District Court of St. Charles Parish, Twenty-Eighth Judicial District, Louisiana, alleging that the Louisiana Tax Commission and the Assessor for the Parish of St. Charles made an assessment on oil in transit in the amount of $200,000.00;

that the appellant refused to pay the tax thereon for the reason that the oils so taxed were in transit from other states in the Union to foreign countries; that the tax was, therefore, a tax and burden on interstate and foreign commerce, and repugnant to the provisions of Article I, Section 8, Clause 3, Article I, Section 9, Clause 5, and Article I, Section 10, Clause 2, of the Constitution of the United States and the laws of the State of Louisiana, and prayed that the Sheriff and Tax Collector and the Assessor for the Parish of St. Charles and the Louisiana Tax Commission be restrained from laying or levying said illegal assessment and that the Sheriff and Tax Collector be restrained from advertising, seizing or attempting to sell appellant's property in his effort to collect the said tax, and that the assessment and tax be declared illegal, null and void.

The Decisions Below.

The trial Court entered a judgment declaring the assessment and taxes levied to be illegal, null and void, and issued an injunction restraining the levying of any tax upon the property of the appellant (R. 21). The Supreme Court of Louisiana reversed the judgment of the trial Court (R. 21).

Essential Facts.

The business of the appellant is buying gasolene, kerosene and various petroleum products for shipment for export (R. 8) to France, England, Belgium, Spain, China, Japan, Australia, and South America (R. 18).

In the conduct of its business the appellant first secures orders for export shipments, then purchases the

petroleum products from various refineries in the Mid-Continent Field, mostly in the States of Kansas, Oklahoma and Texas, from which it is shipped in tank cars (R. 9), consigned to the Petroleum Import & Export Corporation at St. Rose, a subsidiary of appellant (R. 13) on a bill of lading reading for export, and at an export rate (R. 14).

Upon arrival at St. Rose the merchandise oil is emptied from the tank cars into tanks (R. 13) and thence loaded into tank steamers upon their arrival (R. 9).

The appellant never retards the shipment from St. Rose, the only delay ever occasioned being due to delay in the arrival of a vessel or the material (R. 11, 12). A cargo consists of from two to three million gallons and requires from three to five hundred tank cars, an ordinary freight train carrying about thirty tank cars (R. 9, 10). The appellant makes it a point to get the trains of tank cars at the loading depot before the vessel arrives (R. 10).

Neither the State of Louisiana, the Port Authorities of New Orleans, nor the Police Jury of the Parish of St. Charles has provided requisite and necessary facilities for handling cargoes of oil for export. The Petroleum Import & Export Corporation, a subsidiary of appellant, has established and constructed on the Mississippi River front at St. Rose necessary equipment for such handling (R. 8).

Without exception the cargoes are sold by appellant to foreign buyers before it makes any purchases from the refineries (R. 10), and it has never made any shipments

to St. Rose before actual sale to a foreign purchaser (R. 11).

Shipments to St. Rose are made on the export freight rate (R. 14). The merchandise shipped through St. Rose is of a higher gravity than used in this country (R. 13).

No merchandise oil was ever shipped to St. Rose for storage, nor has any merchandise oil located in the tanks at St. Rose ever been sold for the domestic trade in the United States of America or the State of Louisiana (R. 12).

The Parish of St. Charles made an assessment for 1923 against the appellant on merchandise oil at St. Rose in the amount of $200,000.00 upon which a tax was assessed of $3,885.00 (R. 20).

Specification of Assigned Errors Intended to Be Urged.

The Supreme Court of Louisiana erred in reversing the judgment of the trial Court in which the assessment and tax were held to be illegal, null and void (Assignments I, II) (R. 37, 38) and erred in decreeing the collection of the tax (Assignment III) (R. 38).

The said Court erred in holding that the merchandise oil was subject to the State tax (Assignment IV) and was not in transit in foreign commerce (Assignment VI) (R. 38).

The said Court erred in holding that the merchandise oil was not exempt from taxation under the provisions of Article I, Section 8, Clause 3, Article I, Section 9, Clause 5, and Article I, Section 10, Clause 2 of the Constitution of the United States of America (Assignment VIII) (Rec. 39).

Point I.

(a) The Interstate and Foreign Journey Started When the Merchandise Oil Left the Refineries in the Mid-Continent Field and the Continuity of That Journey Was Not Broken By the Interruption at St. Rose.

Champlain Realty Company v. Brattleboro, 260 U. S. 366;

Baltimore & Ohio Southwestern R. R. Co. v. Settle, et al., 260 U. S. 166;

Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469;

Swift & Company v. United States, 196 U. S. 375;

Southern Pacific Terminal Company v. Interstate Commerce Commission, et al., 219 U. S. 498;

Railroad Commission of Ohio v. Worthington, Receiver of the Wheeling & Lake Erie R. R. Co., 225 U. S. 101;

Texas & New Orleans R. R. Co. v. Sabine Tram Co., 227 U. S. 111;

Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 229 U. S. 336;

Philadelphia & Reading Ry. Co. v. Hancock, 253 U. S. 284.

Cases Distinguished.

General Oil Company v. Crain, 209 U. S. 211;

Coe v. Errol, 116 U. S. 517;

Bacon v. Illinois, 227 U. S. 504.

(b) The Equipment at St. Rose Was Solely a Safety Appliance Used in the Continuous Transit of the Merchandise Oil from the Mid-Continent Field to Its Foreign Destination.

Champlain Realty Company v. Brattleboro, 260 U. S. 366;

Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469;

Swift & Company v. United States, 196 U. S. 375;

Southern Pacific Terminal Company v. Interstate Commerce Commission, et al., 219 U. S. 498;

State v. Engle, 34 N. J. L. 425;

State v. Carrigan, 39 N. J. L. 35.

Point II.

The Tax Levied Against the Merchandise Oil Under the General Revenue Act of the State of Louisiana Was Repugnant to the Pertinent Provisions of the Constitution of the United States.

General Revenue Law of Louisiana, Act 109 of 1921;

Constitution of the United States,
Article I, Section 8, Clause 3;
Article I, Section 9, Clause 5;
Article I, Section 10, Clause 2.

Peck & Co. v. Lowe, 247 U. S. 165;

Champlain Realty Company v. Brattleboro, 260 U. S. 366;

Hughes Brothers Timber Co. v. Minnesota, 272 U. S. 469;

Coe v. Errol, 116 U. S. 517.

Point III.

The Judgment of the Supreme Court of Louisiana Should Be Reversed and the Judgment of the Trial Court Affirmed.

Argument.

Point I.

(a) The Interstate and Foreign Journey Started When the Merchandise Oil Left the Refineries in the Mid-Continent Field and the Continuity of That Journey Was Not Broken By the Interruption at St. Rose.

The taxing authorities of the State of Louisiana have assessed a tax on the merchandise oil in question at St. Rose on the theory that the foreign journey did not start until the oil was placed on board a tank steamer.

The undisputed facts conclusively establish, as a matter of law, that the interstate and foreign journey actually started when the merchandise oil left the refineries in the Mid-Continent Field, and that, from that time on, the product was in actual and continuous transit to the final foreign destination.

The appellant, having first obtained orders abroad, went into the Mid-Continent Field and made purchases against those orders at various refineries. The gasolene was manufactured for export and of a quality different from that commonly used in the United States; it was shipped under an export freight rate maintained by the railroads, and as soon after arrival at St. Rose as the vessel supplied by the purchaser arrived, continued on the journey in exactly the same form, character and condition as it had been shipped from the refinery. To fill one vessel required from three hundred to five hundred tank cars, or from ten to fifteen complete freight trains of tank cars. Undisputedly, the railroad facilities at St.

Rose would not permit direct loading from tank car to tank steamer without great inconvenience, waste and loss (R. 18).

In determining the right of a State to tax, Mr. Chief Justice Taft, in *Champlain Realty Co. v. Brattleboro, 260 U. S. 366,* has said, p. *377:*

> "Interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change destination, the agency by which the transit is effected, the actual continuity of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied."

In the instant case it is beyond dispute that it was the intention of the appellant to continue the merchandise oil to the foreign port. That intention is clearly shown by the course of business of the appellant in first securing orders from abroad, in purchasing a quality of gasolene used abroad against these foreign orders actually on hand, in shipping from the Mid-Continent Field to tidewater under the export freight rate, and in placing the oil on board vessel at the very earliest possible moment, and never deviating from that course.

In *Baltimore & Ohio Southwestern Railroad Company v. Settle, et al., 260 U. S. 166,* this Court held that the intention determined, as matter of law, the essential nature of the movement and that, even though the original billing was to a certain point, if the intention was to subsequently re-bill to another state, the entire movement was interstate.

When the appellant caused the merchandise oil to be shipped under the export freight rate, its control to change the destination was surrendered for the reason that the appellant could not obtain for itself the benefit of the lower export railroad freight rate and then apply the merchandise to domestic use.

The agencies by which the transit was effected were the only available methods of transportation. From the interior, tank cars are the only conveyances available in the absence of a pipe line. From the sea port to the foreign port, tank steamers are the only available carriers. At the point of juncture equipment for the discharge from tank cars and thence to tank steamers is the only available agency. The record is clear that in the use of that equipment the only delay ever occasioned in the continuous flow of the merchandise oil was brought about by the necessity of waiting for a tanker or the arrival of a train, causes both beyond the control of the appellant.

The merchandise oil was, therefore, always in actual continuity of transportation with no interruption for the convenience or benefit of the appellant.

The principles by which this case is governed have been clearly announced by this Court in a number of cases. Foremost among these is *Champlain Realty Co. v. Brattleboro, 260 U. S. 366,* in which the Realty Company sought to recover the amount of a tax levied on logs of pulp wood and paid under protest as illegally collected because the logs were then in transit in interstate commerce. The statement of facts shows that the pulp wood was cut by plaintiff at various points in Vermont during the winter and placed upon the banks of the West

River and its tributaries, those streams being all within the State of Vermont, to be floated down into the Connecticut River and thence to their destinations at a mill in New Hampshire owned by the plaintiff. In the spring the plaintiff started the drive down the West River and tributaries, first, however, placing a boom across the mouth of the river at Brattleboro, Vermont, where the West River emptied into the Connecticut, to hold the logs until the Connecticut receded sufficiently to permit the safe transit of the logs to the plaintiff's New Hampshire mill. The tax was levied on the logs while they were held in the boom at Brattleboro. In holding that the interstate trip began when the logs were placed in the West River and tributaries, that the real continuity of the trip was not broken, and that the tax was illegally assessed, Mr. Chief Justice Taft, speaking for the Court, says at p. 373:

> "The question here, then, is: Where did the interstate shipment begin? When the wood was placed in the waters of the West River, in the Towns of Jamaica, Stratton, Londonderry, and Winhall, or at the boom in Brattleboro? * * * Did the fact that before April 3rd the waters of the Connecticut were frozen, or so high as to prevent the logs reaching Hinsdale, requiring a temporary halting at the mouth of the West River, break the real continuity of the interstate journey? We think not. The preparation for the interstate journey had all been completed at the towns on the West River where the wood had been put in the stream. The boom at the mouth of the West River did not constitute an entrepot or depot for the gathering of logs preparatory for the final journey. It was only a safety appliance in the course of the journey. It was a harbor of refuge from danger to a shipment on its way. It was not used by the owner for any beneficial purpose of his

> own except to facilitate the safe delivery of the wood at Hinsdale, on their final journey already begun. The logs were not detained to be classified, measured, counted, or in any way dealt with by the owner for his benefit, except to save them from destruction in the course of their journey, that, but for natural causes, over which he could exercise no control, would have been actually continuous."

It is apparent that the boom at the mouth of the West River was established for the reason that the boom at the mill was not capable of holding the logs against the flood waters of the Connecticut, and they were held there as they arrived from their various points of origin until they could be safely floated down the Connecticut and held in the boom at the mill, and be thus saved from being carried on through the boom to waste and destruction beyond.

In the instant case the gasolene, manufactured in the Mid-Continent Field for export, purchased to fill foreign orders already on hand, shipped for export and on the railroad export freight rate, was taken out of the tank cars at St. Rose for the reason that the railroad facilities were not capable of holding the three hundred to five hundred cars required to fill one tank steamer, and was placed in the equipment maintained by the plaintiff's subsidiary, and was thus saved from waste (R. 17).

The interruption at St. Rose was clearly only to promote the safe or convenient transit of the merchandise oil, and as this Court said in the *Brattleboro case*, p. 376:

> "If the interruptions are only to promote the safe or convenient transit, then the continuity of the interstate trip is not broken."

One could as well contend that a shipment of meat from the great packing plants in the interior could not be removed from a refrigerator car to a refrigerating plant before being placed on board a vessel for export, and thus saved from destruction by decay, as to contend that a highly volatile and explosive gasolene could not be removed from a tank car to a safety tank and thus saved from danger and evaporation under the semi-tropical sun of St. Rose, Louisiana.

The record is clear and undisputed that there was no change in the character of the merchandise oil at St. Rose, that it was not classified, or in any way dealt with by appellant (R. 18), that the appellant never retarded the shipment (R. 11), that there was never any delay in the continuity of the interstate journey unless caused by the delay in the arrival of the vessel or train (R. 11, 12), causes over which the appellant had no more control than the mill owner had over the waters of the Connecticut.

The doctrine of the *Brattleboro case* has been reiterated in *Hughes Bros. Timber Company v. Minnesota, 272 U. S. 469,* also a tax case, which was brought by the Treasurer of Cook County, Minnesota, to collect taxes on personal property owned by the timber company. The timber company cut pulp wood at various places in Cook County, from which places it was hauled to the Swamp River and piled upon the ice and river banks a short distance above its discharge into the Pigeon River. The timber company had contracted with a paper company of Michigan to deliver to the paper company, over the rail of the latter's vessels at the mouth of the Pigeon River, a quantity of spruce pulp wood. The hauling and

placing of the logs on the ice and on the banks of the Swamp River were completed in the latter part of March. When the ice broke in April, the drive of the logs began, those on the ice moving themselves and those on the banks being pushed in, and was completed eighteen days later when the logs reached the Pigeon River booms. By the latter part of July all of the logs had been shipped by vessel to Michigan. As the Court say at p. 474:

> "All this characterizes what was being done in the drive between the Swamp River entrepot and the mouth of the Pigeon River. That was the beginning or first leg of the interstate journey. The obligations of both parties accorded with that view. The change in the method of transportation by floating to carriage on the vessel did not affect the continuity of the interstate passage, if such a passage was intended by the parties and had begun, any more than did shipment by local railroad bills of lading from a point in a state to a port of the same state, for shipment by vessel to a foreign port, prevent its being interstate or foreign commerce."

We can discern no difference between delivering pulp wood over the rail of a purchaser's vessel and delivering merchandise oil into the hold of the purchaser's tank steamer. In the timber case the actual drive of the logs to the port of loading upon the vessel was completed not later than April 17th, yet they were not all shipped by vessel until the latter part of July, and that interruption was, in the language of Mr. Chief Justice Taft, "only incidental to the journey and the necessary change in the mode of transportation." Under those circumstances this Court held the property not subject to local taxation.

So in the instant case, we most respectfully urge, that any delay at St. Rose was only incidental to the journey and the necessary change in the mode of transportation, and the property was, therefore, not taxable by the State.

It is not in tax cases alone that this Court has held that an interruption in a journey does not remove the merchandise from its character as an interstate shipment, but such holding is made in cases involving combinations in restraint of trade, the power of the Interstate Commerce Commission to fix freight rates, and compensation cases, as well as many others.

Swift & Company v. United States, 196 U. S. 375, is one of the cases involving an alleged combination in restraint of trade, in which the Court said, at p. 398:

> "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. * * *
>
> "It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed, 192 U. S. 500.*"

How much stronger is the instant case where the interruption at tide-water was not for the purpose of procur-

ing a purchaser, but solely for the purpose of transferring from rail to water transportation.

Southern Pacific Terminal Company v. Interstate Commerce Commission, et al., 219 U. S. 498, in which it was sought to establish that a railroad was favoring one customer, clearly brings out our contention that the necessary stoppage in transit at tide-water is not such an interruption as to break the continuity of the interstate and foreign shipment. In that case it appears that the Southern Pacific Terminal Company owns certain piers at Galveston, Texas, on which it has erected all facilities for handling imported and exported freight and another pier erected for one Young, a merchant engaged in buying and selling cotton seed cake in the interior, shipping it to himself by carloads at the pier, where, by the use of machinery, he grinds it into meal, sacks it and then loads it into steamships berthed at the pier for export. The Court, in holding the merchandise to be in foreign commerce, say, at p. 526:

> "In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. • • • It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg, and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for

such purpose. The case, therefore, comes under *Coe v. Errol, 116 U. S. 517,* where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another state or been delivered to a carrier for transportation.' "

That case discloses a situation where the shipper is in control as lessee of equipment for handling the commodity at tide-water, just as is the appellant in the instant case through the ownership, by its subsidiary, of the equipment at St. Rose, but in the cited case the use of that equipment was not solely for the purpose of transferring the freight from land to water, but was for the purpose of converting cotton seed into meal, and then into sacks before shipment abroad, either to fill orders already on hand, or orders then taken. That commodity the Court held still to be in transit. In the instant case there was no change in the character of the commodity, there was no holding pending a sale, but the merchandise oil was at St. Rose to fill orders taken before the oil was purchased at the refineries and was moved at the very earliest possible moment.

Cases involving the fixing of freight rates are well summarized in *Railroad Commission of Ohio v. Worthington, Receiver of the Wheeling & Lake Erie Railroad Company, 225 U. S. 101,* a case involving the right of the Ohio Railroad Commission to regulate the railroad freight rate on coal mined in Ohio and shipped by rail, under an export freight rate, either to Huron or Cleveland, where the railroad has elaborate facilities for loading into vessels. The coal may be accumulated in large quantities at Huron and only taken out of the accumu-

lated lots from time to time, when it is put upon vessels and shipped out of the State, and on those facts this Court held, at p. 108:

> "By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, * * *"

There, even though the coal may be accumulated in large quantities at the point of loading upon board the vessels, the shipment having been intended for interstate carriage, retained that character. At St. Rose there was no accumulation, except that necessary to fill the vessel.

Another tax case, involving a foreign shipment, is *Texas & New Orleans Railroad Company v. Sabine Tram Company, 227 U. S. 111,* in which it is held that lumber purchased in Texas, shipped by rail to tide-water, there placed in the water and subsequently shipped to a foreign port, was in continuous transportation to a foreign port from the time it left the mill in the interior, the Court saying, at p. 130:

> "The lumber was ordered, manufactured, and shipped for export. And we say "shipped", for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. * * * And the shipment was not an isolated one, but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber

to foreign countries by the delay and its transshipment at Sabine. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

So, also, the shipment of merchandise oil through St. Rose was not an isolated transaction, but was part of a continuous performance, the shipments running up to fifty tank steamers a year, aggregating between one hundred and one hundred fifty million gallons of gasolene.

To the same effect is *Railroad Commission of Louisiana v. Texas and Pacific Railway Company, 229 U. S. 336,* involving numerous shipments to New Orleans of logs and staves on shipper's or consignee's order bill of lading, all of the shipments being forwarded abroad by steamer.

The doctrine as applied in compensation cases is found in *Philadelphia & Reading Railway Company v. Hancock, 253 U. S. 284,* in which it is held that an employe engaged in transporting cars from the colliery to the railroad yard two miles away, where the cars were gathered into trains to be transported to other states, was engaged in interstate commerce, saying that "the shipment was but a step in the transportation of the coal to real and ultimate destinations in another state."

Thus, we submit, that from every angle of the transaction this Court has held uniformly that where goods are shipped from one State to another, or from a State to tide-water, for export, even though there be an incidental interruption in the journey, still the commodity remains at all times in interstate or foreign commerce.

Appellees' Contentions Distinguished.

The appellees have argued that St. Rose was the point at which the foreign commerce actually started, but their argument is based upon a theory contrary to the undisputed fact, clearly testified to, that, from the moment the merchandise oil was placed upon the tank cars at the refineries in the Mid-Continent Field, it was intended for the foreign destination to which it actually went by rail and vessel in continuous shipment until it reached the purchaser in a foreign country, with no interruption except that necessary temporary delay incident to the change from rail to water transportation. In support of their theory the appellees have relied principally upon *General Oil Company v. Crain, 209 U. S. 211*, and *Coe v. Errol, 116 U. S. 517*, and the decision of the Supreme Court of Louisiana is based upon the *Crain case*, but under a misapprehension of the facts, facts which are clearly distinguishable from the present case, and under a misapprehension of the holding which is in harmony with the judgment of the trial Court that the merchandise oil was not taxable, and entirely contrary to the holding of the Louisiana Supreme Court.

A major distinguishing feature of the *Crain case* is most effectively stated by Mr. Chief Justice Taft in the *Brattleboro case* at page 375 *(260 U. S. supra)*, as follows:

> "So in *General Oil Company v. Crain, 209 U. S. 211*, the Oil Company had its principal place of business in Memphis, Tennessee, for the manufacture and sale of illuminating oils in interstate commerce. It imported oil from other states and put it into a tank, appropriately marked for distribution in smaller ves-

sels to fill orders for oil already sold in Arkansas, Louisiana, and Mississippi. The court held that the first shipment had ended; that its storage at Memphis for division and distribution to various points was for the business purposes and profit of the company. The court continued:

"'It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation.' (p. 231). The tank at Memphis thus became a depot in its oil business for preparing the oil for another interstate journey."

In the instant case there was no preparing of the oil for another interstate journey. There was no division and distribution; it was merely halted in its journey for the necessary transfer from overland transportation to water transportation.

Another distinguishing feature in the *Crain case* is that the oil in bulk was stored in the company's tanks for the purpose of being broken up into small quantities, such as barrel quantities for shipment to customers. Not so in the present case. Still another distinction is that the oil company was doing a local business in Memphis where the property was taxed. Not so in the instant case. All of the merchandise oil which went to St. Rose was transported to Europe.

Turning then to *Coe v. Errol, 116 U. S. 517*, the facts differ from the instant case in that Coe and others owned a large number of spruce logs which had been drawn down during the winter before April 1, 1880, from Wentworth's Location in New Hampshire, and placed in Clear Stream and on its banks in the town of Errol, Coos County, New

Hampshire, to be thence floated down the Androscogin River to the State of Maine to be there manufactured and sold. Another quantity of spruce logs belonging to Coe and another had been cut in Maine and were being floated to Lewiston, Maine, to be manufactured but were detained in the Town of Errol, New Hampshire, by low water. The Supreme Court of New Hampshire abated the tax on those logs which were detained because of the low water, but sustained the tax on the others. That judgment was affirmed. It is a clear holding that the logs which were interrupted in their continuous transit by reason of the inability to keep them moving were not taxable. That is exactly the situation with the merchandise oil now in question. The difference between the situation as to those logs which were detained by low water, and the logs which were assembled in the Township of Errol, is made clear in the reference to the *Crain case*, in the *Brattleboro* opinion, p. 372 *(260 U. S., supra)*:

> "The learned justice states the rule to be 'that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey' (p. 527).
>
> "Again, on page 528, Justice Bradley said: 'The carrying of them in carts or other vehicles, or even floating them to the depot, where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common

carrier for transportation to such state, its destination is not fixed and certain.'

* * *

"The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the supreme court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the state of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston, in the state of Maine. There they were to remain until it should be convenient to send them to their destination" (p. 528).

How different is the situation with the merchandise oil in question. It had been refined to meet the requirements of European countries. The appellant had already sold it in the foreign market, and it had purchased it in the Mid-Continent Field to fill orders actually on hand. It had entered it with the railroad company as a commodity for export and had paid the foreign export freight rates. It had caused it to be transported to the waterside on its way to the foreign destination and, at waterside, as soon as it could be placed in a tank steamer, it continued in bulk on the journey, started back in the Mid-Continent Field, to its final place of destination abroad. It was handled in the only safe and feasible way. The temporary interruption in its journey was necessary in its handling and loading into tankers.

The distinction in the *Coe case* is again brought out and referred to by this Court in the *Hughes Brothers Timber Company case, 272 U. S. 469,* at p. *475 (supra).*

Another case relied upon by the appellees is *Bacon v. Illinois, 227 U. S. 504,* and that also is conclusively distinguished in the *Brattleboro case* at p. 374: It is pointed out that Bacon bought shipments of grain *in transitu* from western states to New York, and that on arrival of the grain in Chicago, Bacon removed the grain from the cars to his private elevator for the purpose of inspecting, weighing, grading, mixing, etc., but not to change its ownership, consignee, or destination, and the Court held that, whatever his intention, the grain was at rest within his complete power of disposition, held for his own benefit and taxable, saying:

> "His storing of the grain was not to facilitate interstate shipments of the grain, or save it from the danger of the journey. It was to enable him to treat the grain so as to enable him more conveniently to dispose of it. He made his warehouse a depot for its preparation for further shipment and sale. He had thus suspended the interstate commerce journey and brought the grain within the taxable jurisdiction of the state."

The distinguishing facts are at once apparent. Bacon, having purchased some carloads of grain then rolling under through bill of lading from the West to New York, diverted the shipments to his private elevator in Chicago for the purpose of inspecting, weighing, grading and mixing; in other words, the shipment, for no cause except the convenience of the purchaser, was diverted from its original shipment and brought to a halt at the grain elevator and there dealt with for the benefit of the owner.

In the instant case when the merchandise oil was once consigned from the refineries to tide-water under a bill of lading marked for export, and on the export rate, that merchandise oil never deviated in the slightest from the

journey as originally intended, and was never interrupted for any purpose except to change the method of transportation from rail to water and remained at all times in actual continuous interstate and foreign shipment.

We, therefore, submit that the merchandise oil in question, at the time of the assessment, was in actual foreign commerce, and that the tax was illegally assessed.

(b) The Equipment at St. Rose Was Solely a Safety Appliance Used in the Continuous Transit of the Merchandise Oil from the Mid-Continent Field to Its Foreign Destination.

The evidence establishes that neither the State of Louisiana, the Port Authorities of New Orleans, nor the Police Jury of the Parish of St. Charles has provided the requisite and necessary facilities for handling the oil for export, and that the Petroleum Import & Export Corporation has established and constructed such necessary facilities and equipment at St. Rose (R. 8).

The merchandise oil upon arrival at St. Rose by rail is discharged into the tanks owned by appellant's subsidiary, and there reloaded into a tank steamer as soon as the vessel is available, and immediately continued on its journey to foreign destination (R. 9).

There is no delay or standing of any quantity of gasolene at St. Rose except waiting for a vessel (R. 18). This method is a necessary accommodation in loading foreign merchandise (R. 16).

We have already seen in *Champlain Realty Company v. Brattleboor, 260 U. S. 366,* that the boom at the mouth of the West River, where the logs were held pending a receding of the Connecticut River, and in *Hughes Brothers Timber Company v. Minnesota, 272 U. S. 469,* that the booms in the Pigeon River, where the logs were held until they could be loaded upon a vessel, were a mere safety appliance in the continuous interstate journey.

Likewise, in *Swift & Company v. United States, 196 U. S. 375,* we have also seen that the stock yards are a mere convenience in the interstate transportation, and in *Southern Pacific Terminal Company v. Interstate Commerce Commission, et al., 219 U. S. 498,* that the pier at the tide-water, where the cotton seed was manufactured into meal, and then shipped, was only an incident in the continuous transportation.

In *State v. Engle, 34 N. J. L. 425,* cited with approval in *Champlain Realty Company v. Brattleboro, 260 U. S. 366,* coal mined in Pennsylvania was shipped by cars to Elizabethport, New Jersey, to be thence shipped by water to other markets for the purpose of sale. At Elizabethport on tide-water the coal was deposited and separated according to its different sizes, and when a cargo of one size was obtained it was shipped to points in other states as soon as a vessel could be chartered to carry it, no coal being sold for consumption at Elizabethport, the Court saying:

> "The power of the state to tax the subjects of commerce, where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on

property belonging to a citizen of another state, in its transit to market in other states, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipment to its destination, is a tax on commerce among the states, is too plain to require argument.

"Delay within the state, which is no longer than is necessary for the convenience of trans-shipment for its transportation to its destination, will not make it property within the state for the purposes of taxation."

In that case the docks at waterside were the implement necessary in the change from rail to water transportation; in that case there was not only the holding while waiting for the vessel, there was also a separation of the coal into different sizes. In the instant case there was only the holding, no separation.

To the same effect is *State v. Carrigan, 39 N. J. L. 35,* also cited with approval in the *Brattleboro case.*

The appellant ships up to fifty tankers a year (R. 15), an average of approximately one tanker each week. Some method was necessary for the handling of this weekly two million to three million gallons of merchandise oil in its constant flow through the port at St. Rose. The equipment constructed by the appellant's subsidiary furnishes that method of change from rail to water transportation.

We therefore submit that the use of the facilities furnished at St. Rose by which the oil was safely, conveniently and quickly transferred from rail to water car-

riage, did not give the merchandise oil thus being transferred a situs in the State of Louisiana, and that the attempt to tax the commodity at that time was illegal.

Point II.

The Tax Levied Against the Merchandise Oil Under the General Revenue Act of the State of Louisiana Was Repugnant to the Pertinent Provisions of the Constitution of the United tSates.

The General Revenue Law of Louisiana, Act 109 of 1921, under which this tax was assessed, is entitled:

> "To provide an annual revenue for the State of Louisiana, by the levying of annual taxes upon all property not exempted from taxation; fixing the rates; and setting forth the purposes for which said levy is made; and prescribing the method of assessing and collecting the same; and enforcing the payment thereof."

The Constitution of the United States of America provides as follows:

> "*Article I, Section 8, Clause 3:*
> "The Congress shall have power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"
> *Article I, Section 9, Clause 5:*
> "No Tax or Duty shall be laid on Articles exported from any State."
>
> *Article I, Section 10, Clause 2:*
> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treas-

> ury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The assessment roll shows that the tax was divided for State, Parish, Levee, School and Road purposes (R. 20) and was not, therefore, a tax embraced within the exception contained in the Constitution.

In *Peck & Co. v. Lowe, 247 U. S. 165,* the Court has said of Article I, Section 9, Clause 5 of the Constitution, at p. 173:

> "That clause says 'No tax or duty shall be laid on articles exported from any State.' Of course, it qualifies and restricts the power to tax as broadly conferred. But to what extent? The decisions of this court answer that it excepts from the range of that power articles in course of exportation, * * * In short, the court has interpreted the clause as meaning that exportation must be free from taxation."

We, therefore, respectfully submit that the undisputed facts in this record, to which we have already made reference, clearly come within those cases where this Court has held that the property was in actual interstate and foreign commerce, and that the oil was not legally taxable in the State of Louisiana.

Point III.

The Judgment of the Supreme Court of Louisiana Should Be Reversed and the Judgment of the Trial Court Affirmed.

The Constitution of the United States has deprived the individual States of the right to tax commodities moving in interstate and foreign commerce.

The facts are clear and undisputed, and to the effect that the equipment was constructed at St. Rose as a necessity; that the merchandise oil started on its foreign journey from the Mid-Continent Field; that that journey was interrupted at St. Rose merely because of the absolute necessity in changing from rail to water transportation; that no business of any kind or character was transacted at St. Rose except this necessary handling in the change from rail to water transportation, yet the taxing authorities have placed an assessment on that moving bulk property.

We submit that the tax is illegal for the reason that it is placed upon the property in actual and continuous foreign transit, and is, therefore, repugnant to the provisions of the Constitution of the United States.

Respectfully submitted,

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